

Sep 26, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DEBRA H.,

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

NO: 1:18-CV-03172-FVS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment.

ECF Nos. 12, 13. This matter was submitted for consideration without oral  
argument. Plaintiff is represented by attorney D. James Tree. Defendant is

---

<sup>1</sup> Andrew M. Saul is now the Commissioner of the Social Security

Administration. Accordingly, the Court substitutes Andrew M. Saul as the  
Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P.  
25(d).

1 represented by Special Assistant United States Attorney Justin L. Martin. The  
2 Court, having reviewed the administrative record and the parties' briefing, is fully  
3 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 12, is  
4 granted and Defendant's Motion, ECF No. 13, is denied.

### 5 **JURISDICTION**

6 Plaintiff Debra H.<sup>2</sup> (Plaintiff) filed for disability insurance benefits (DIB) and  
7 supplemental security income (SSI) on September 8, 2014, alleging an onset date of  
8 March 31, 2011. Tr. 246-58. Benefits were denied initially, Tr. 137-45, and upon  
9 reconsideration, Tr. 148-59. Plaintiff appeared at a hearing before an administrative  
10 law judge (ALJ) on June 5, 2017. Tr. 38-80. On July 26, 2017, the ALJ issued an  
11 unfavorable decision, Tr. 15-35, and on July 2, 2018, the Appeals Council denied  
12 review. Tr. 1-6. The matter is now before this Court pursuant to 42 U.S.C. §§  
13 405(g); 1383(c)(3).

### 14 **BACKGROUND**

15 The facts of the case are set forth in the administrative hearing and transcripts,  
16 the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are  
17 therefore only summarized here.

18  
19 \_\_\_\_\_  
20 <sup>2</sup>In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first  
21 name and last initial, and, subsequently, Plaintiff's first name only, throughout this  
decision.

1 Plaintiff was 41 years old at the time of the hearing. Tr. 69. She has a high  
2 school diploma. Tr. 69. She has work experience as cherry packer, an office worker  
3 for a prosthetics company, field supervisor, and child monitor. Tr. 65, 70-72.

4 Plaintiff hit her head on a vice at work in September 2010 and started having  
5 headaches and vision problems. Tr. 58-59. She testified she cannot work because  
6 she always has a headache. Tr. 56. Sometimes her vision wavers. Tr. 56. She  
7 cannot work on computers and she cannot watch much television due to her vision.  
8 If she tries to focus on computers or paperwork, her eyes go in and out of focus and  
9 her headache is aggravated. Tr. 57-58. Plaintiff estimated she has seven bad  
10 headaches a month, which means she loses vision in her right eye, vomits, and  
11 cannot leave the house. Tr. 58, 62.

12 In April 2014, her husband at the time pointed a gun at her and threatened to  
13 kill her. Tr. 354, 717. He went to prison for this crime. Tr. 354. As a result of this  
14 incident, she has night terrors and panic attacks. Tr. 63. Sometimes she cannot  
15 leave the house. Tr. 64. She has anxiety episodes every day. Tr. 64. If she was  
16 working and had an anxiety attack or flashback, she would freeze, panic, and bolt.  
17 Tr. 65-66. She has passed out due to an anxiety attack in the past. Tr. 65. She has  
18 anxiety flareups at least a couple of times per week. Tr. 66.

## 19 STANDARD OF REVIEW

20 A district court's review of a final decision of the Commissioner of Social  
21 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
limited; the Commissioner's decision will be disturbed "only if it is not supported by

1 substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158  
2 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable  
3 mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and  
4 citation omitted). Stated differently, substantial evidence equates to “more than a  
5 mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted).  
6 In determining whether the standard has been satisfied, a reviewing court must  
7 consider the entire record as a whole rather than searching for supporting evidence in  
8 isolation. *Id.*

9 In reviewing a denial of benefits, a district court may not substitute its  
10 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
11 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
12 rational interpretation, [the court] must uphold the ALJ’s findings if they are  
13 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674  
14 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s  
15 decision on account of an error that is harmless.” *Id.* An error is harmless “where it  
16 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115  
17 (quotation and citation omitted). The party appealing the ALJ’s decision generally  
18 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.  
19 396, 409-10 (2009).

## 20 **FIVE-STEP EVALUATION PROCESS**

21 A claimant must satisfy two conditions to be considered “disabled” within the  
meaning of the Social Security Act. First, the claimant must be “unable to engage in

1 any substantial gainful activity by reason of any medically determinable physical or  
2 mental impairment which can be expected to result in death or which has lasted or  
3 can be expected to last for a continuous period of not less than twelve months.” 42  
4 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s impairment must  
5 be “of such severity that he is not only unable to do his previous work[,] but cannot,  
6 considering his age, education, and work experience, engage in any other kind of  
7 substantial gainful work which exists in the national economy.” 42 U.S.C. §§  
8 423(d)(2)(A), 1382c(a)(3)(B).

9 The Commissioner has established a five-step sequential analysis to determine  
10 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-  
11 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s  
12 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is  
13 engaged in “substantial gainful activity,” the Commissioner must find that the  
14 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

15 If the claimant is not engaged in substantial gainful activity, the analysis  
16 proceeds to step two. At this step, the Commissioner considers the severity of the  
17 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
18 claimant suffers from “any impairment or combination of impairments which  
19 significantly limits [his or her] physical or mental ability to do basic work  
20 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
21 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,

1 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
2 §§ 404.1520(c), 416.920(c).

3 At step three, the Commissioner compares the claimant's impairment to  
4 severe impairments recognized by the Commissioner to be so severe as to preclude a  
5 person from engaging in substantial gainful activity. 20 C.F.R. §§  
6 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe  
7 than one of the enumerated impairments, the Commissioner must find the claimant  
8 disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

9 If the severity of the claimant's impairment does not meet or exceed the  
10 severity of the enumerated impairments, the Commissioner must pause to assess the  
11 claimant's "residual functional capacity." Residual functional capacity (RFC),  
12 defined generally as the claimant's ability to perform physical and mental work  
13 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
14 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
15 analysis.

16 At step four, the Commissioner considers whether, in view of the claimant's  
17 RFC, the claimant is capable of performing work that he or she has performed in the  
18 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the  
19 claimant is capable of performing past relevant work, the Commissioner must find  
20 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the  
21 claimant is incapable of performing such work, the analysis proceeds to step five.

1 At step five, the Commissioner should conclude whether, in view of the  
2 claimant's RFC, the claimant is capable of performing other work in the national  
3 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this  
4 determination, the Commissioner must also consider vocational factors such as the  
5 claimant's age, education and past work experience. 20 C.F.R. §§  
6 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other  
7 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
8 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
9 work, analysis concludes with a finding that the claimant is disabled and is therefore  
10 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

11 The claimant bears the burden of proof at steps one through four above.  
12 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
13 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
14 capable of performing other work; and (2) such work "exists in significant numbers  
15 in the national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*  
16 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 17 **ALJ'S FINDINGS**

18 At step one, the ALJ found Plaintiff did not engage in substantial gainful  
19 activity since March 31, 2011, the alleged onset date. Tr. 17. At step two, the ALJ  
20 found that Plaintiff has the following severe impairments: lumbar spine disorder  
21 (spondylosis, mild levo-convex scoliosis, and degenerative disc disease with left foot  
drop); headaches; asthma; obesity (vs. overweight), history of supraventricular

1 tachycardia; post herpetic neuralgia; history of multiple rib fractures; mild  
2 neurocognitive disorder due to a traumatic brain injury; affective disorder (major  
3 depression); anxiety related disorders (anxiety disorder and posttraumatic stress  
4 disorder (PTSD)); and somatic disorder (pain disorder). Tr. 17. At step three, the  
5 ALJ found that Plaintiff does not have an impairment or combination of impairments  
6 that meets or medically equals the severity of a listed impairment. Tr. 18.

7 The ALJ then found that Plaintiff has the residual functional capacity to  
8 perform light work with the following additional limitations:

9 She is able to stand and/or walk for 4 hours in an 8-hour workday; she  
10 is unable to operate foot controls; she is able to occasionally balance,  
11 stoop, kneel, and crouch; she cannot climb or crawl; she must avoid  
12 concentrated exposure to extreme cold, wetness, and pulmonary  
13 irritants; she must avoid vibration and hazards (including unprotected  
14 heights); she is able to perform simple, routine tasks and follow short,  
15 simple instructions; she is able to do work that needs little or no  
16 judgment; she is able to perform simple duties that can be learned on  
17 the job in a short period[]; she requires a work environment that is  
18 predictable and with few work setting changes; and she is unable to  
19 deal with the general public (as in a sales position or another position  
20 where the general public is frequently encountered as an essential  
21 element of the work process), although incidental contact of a  
superficial nature with the general public is not precluded.

Tr. 19-20.

At step four, the ALJ found that Plaintiff is unable to perform past relevant  
work. Tr. 27. At step five, after considering the testimony of a vocational expert  
and Plaintiff's age, education, work experience, and residual functional capacity, the  
ALJ found there are other jobs that exist in significant numbers in the national  
economy that Plaintiff can perform such as small product assembler, inspector and



1 hand packager, or electronic accessory assembler. Tr. 28. Thus, the ALJ concluded  
2 that Plaintiff has not been under a disability, as defined in the Social Security Act,  
3 from March 31, 2011, through the date of the decision. Tr. 29.

## 4 **ISSUES**

5 Plaintiff seeks judicial review of the Commissioner's final decision denying  
6 disability income benefits under Title II and supplemental security income under  
7 Title XVI of the Social Security Act. ECF No. 12. Plaintiff raises the following  
8 issues for review:

- 9 1. Whether the ALJ properly considered the medical opinion evidence;
- 10 2. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 11 3. Whether the ALJ had a duty to develop the record; and
- 12 4. Whether the ALJ erred at step five.

13 ECF No. 12 at 2.

## 14 **DISCUSSION**

### 15 **A. Medical Opinion Evidence**

16 Plaintiff contends the ALJ failed to properly consider the opinions of treating  
17 neurologist, Peter C. Gilmore, M.D.; examining psychologist Roland Dougherty,  
18 Ph.D.; medical expert Peter Schosheim, M.D.; reviewing psychologist Diane  
19 Fligstein, Ph.D.; and treating provider Shannon Neer, PA-C. ECF No. 12 at 6-15.

20 There are three types of physicians: "(1) those who treat the claimant (treating  
21 physicians); (2) those who examine but do not treat the claimant (examining  
physicians); and (3) those who neither examine nor treat the claimant but who

1 review the claimant's file (nonexamining or reviewing physicians)." *Holohan v.*  
2 *Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). "Generally,  
3 a treating physician's opinion carries more weight than an examining physician's,  
4 and an examining physician's opinion carries more weight than a reviewing  
5 physician's." *Id.* "In addition, the regulations give more weight to opinions that are  
6 explained than to those that are not, and to the opinions of specialists concerning  
7 matters relating to their specialty over that of nonspecialists." *Id.* (citations omitted).

8 If a treating or examining physician's opinion is uncontradicted, an ALJ may  
9 reject it only by offering "clear and convincing reasons that are supported by  
10 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
11 "However, the ALJ need not accept the opinion of any physician, including a  
12 treating physician, if that opinion is brief, conclusory and inadequately supported by  
13 clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
14 (internal quotation marks and brackets omitted). "If a treating or examining doctor's  
15 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by  
16 providing specific and legitimate reasons that are supported by substantial  
17 evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-31  
18 (9th Cir. 1995)).

19 The opinion of an acceptable medical source, such as a physician or  
20 psychologist, is given more weight than that of an "other source." 20 C.F.R. §§  
21 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). "Other  
sources" include nurse practitioners, physician assistants, therapists, teachers, social

1 workers, spouses and other non-medical sources. 20 C.F.R. §§ 404.1513(d),  
2 416.913(d) (2013).<sup>3</sup> The ALJ is required to consider evidence from “other sources,”  
3 but may discount testimony from these sources if the ALJ “gives reasons germane to  
4 each witness for doing so.” *Molina*, 674 F.3d at 1104.

5 In July 2014, Dr. Gilmore, a treating neurologist, wrote a letter indicating  
6 Plaintiff has a diagnosis of post-concussion syndrome with continuing headaches,  
7 difficulties with vision, and poor cognition. Tr. 642. He opined that “due to these  
8 problems, she is unable to work and because of poor cognition she would be  
9 unreliable.” Tr. 642. He indicated that her vision caused difficulty reading and  
10 headaches are a factor in her inability to concentrate. Tr. 642. He also wrote that he  
11 had previously dictated his opinion in April 2014. Tr. 642. The ALJ gave no weight  
12 to Dr. Gilmore’s opinion. Tr. 25.

13 First, the ALJ noted a conclusion regarding the capacity to work is a legal  
14 determination reserved for the Commissioner. Tr. 25. The ALJ is responsible for  
15

---

16 <sup>3</sup> Effective March 27, 2017, the definition of an “acceptable medical source”  
17 changed to include some sources previously considered to be “other” sources. *See*  
18 20 C.F.R. §§ 404.1520, 416.920 (2017). However, for licensed audiologists,  
19 licensed advanced practice registered nurses, and licensed physician assistants, the  
20 change applies “only with respect to claims filed . . . on or after March 27, 2017.”  
21 20 C.F.R. §§ 404.1502(a)(6)-(8), 416.902(a)(6)-(8) (2017).

1 determining whether a claimant meets the statutory definition of disability, not a  
2 physician. Social Security Ruling (S.S.R.) 96-5p, at \*5 (July 2, 1996), *available at*  
3 1996 WL 374183. A medical source that a claimant is “disabled” or “unable to  
4 work” does not require the ALJ to determine the claimant meets the definition of  
5 disability. 20 CFR §§ 404.1527(d)(1); 416.927(d)(1). It was reasonable for the ALJ  
6 to reject this portion of Dr. Gilmore’s opinion on this basis.

7 Second, the ALJ found the record does not contain any exam records from Dr.  
8 Gilmore during the relevant period. Tr. 25. A medical opinion may be rejected if it  
9 is unsupported by medical findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm’r of*  
10 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Thomas v. Barnhart*, 278  
11 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.  
12 2001); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.1992). The ALJ noted that  
13 Dr. Gilmore’s office indicated that it had no records after 2010. Tr. 25 (citing Tr.  
14 700). Thus, the ALJ concluded Dr. Gilmore had no basis upon which to determine  
15 that Plaintiff was unable to work during the relevant period.<sup>4</sup> Tr. 25.

16 However, the ALJ erroneously referenced a note from Neurological  
17 Associates of Yakima, which is not affiliated with Dr. Gilmore. Tr. 642, 700. A  
18 records request from the Social Security Administration to Dr. Gilmore’s clinic,

---

19  
20 <sup>4</sup>Dr. Gilmore previously evaluated Plaintiff in January 2007 for her work-related  
21 back injury and L&I claim. Tr. 25, 420-22. The evaluation did not address the  
symptoms resulting from her head trauma which occurred in 2010.

1 Northwest Neurosciences, asked for records dated July 17, 2014, the day after Dr.  
2 Gilmore's opinion. Tr. 1047. Northwest Neurosciences responded that there were  
3 no records after July 17, 2014 and indicated, "[p]atient last seen 3/25/14." This  
4 reasonably suggests that, contrary to the ALJ's finding, Dr. Gilmore did see Plaintiff  
5 shortly before rendering his opinion. This is confirmed by other references to Dr.  
6 Gilmore in the record during the relevant period. See Tr. 646 (noting Plaintiff was  
7 followed by Dr. Gilmore for headaches, last seen April 2014), 750 (records review  
8 indicated Dr. Gilmore made a referral in April 2013 for migraine treatment). The  
9 ALJ's finding that Dr. Gilmore did not examine Plaintiff during the relevant period  
10 is therefore based on error.

11 The error impacts the ALJ's other reasons for rejecting Dr. Gilmore's opinion.  
12 Second, the ALJ found Dr. Gilmore's opinion that Plaintiff cannot concentrate is  
13 inconsistent with the record because although Roland Dougherty, Ph.D., an  
14 examining psychologist, found some memory and concentration issues in February  
15 2015, he did not conclude Plaintiff cannot concentrate. Tr. 25. This is inconsistent  
16 with the ALJ's determination that Dr. Dougherty's findings should be rejected  
17 because they touch on medical issues rather than psychological issues. Tr. 26.  
18 Furthermore, the ALJ's finding is suspect because the record does not contain any  
19 findings regarding Plaintiff's concentration and neurocognitive disorder from a  
20 medical perspective (rather than a psychological perspective) which were credited  
21 by the ALJ. However, as discussed *supra*, Dr. Gilmore's office visit notes for the  
relevant period are missing from the records. Review of these records is necessary

1 to determine whether Dr. Gilmore's opinion regarding Plaintiff's concentration is  
2 supported by his findings.

3 Third, the ALJ found records pertaining to Plaintiff's vision do not establish  
4 that Plaintiff cannot read. Tr. 25. Dr. Gilmore did not indicate that Plaintiff cannot  
5 read; he opined that she had difficulty reading due to her vision. Tr. 642. This is  
6 consistent with Dr. Dougherty's observation that Plaintiff had "significant visual  
7 perceptual difficulties," was not able to adequately distinguish the numbers and  
8 letters during testing, and was no longer able to read due to her visual problems. Tr.  
9 720. Again, it would be reasonable to expect that Dr. Gilmore's treatment notes  
10 may contain findings (or an absence of findings) supporting his conclusions  
11 regarding Plaintiff's vision which must be considered in evaluating his opinion.

12 Fourth, the ALJ concluded that the opinion that Plaintiff is unreliable is based  
13 on unsupported speculation. Tr. 25. This finding is also impacted by the ALJ's  
14 error since it is unclear whether Dr. Gilmore's conclusion is supported without  
15 reviewing his treatment notes for the relevant period.

16 Dr. Gilmore's opinion and the ALJ's error are especially significant because  
17 there are no other neurological opinions in the record and the ALJ rejected other  
18 opinion evidence related to Plaintiff's neurocognitive disorder and headaches. The  
19 medical expert, Peter Schosheim, M.D., an orthopedic surgeon, described himself as  
20 having expertise in musculoskeletal disease involving the back and joints. Tr. 43-  
21 44. He testified only about Plaintiff's back and neck issues and gave no opinion

1 about areas outside of his expertise such as Plaintiff's traumatic brain injury or  
2 headaches.<sup>5</sup> Tr. 48.

3 The reviewing physician, Olegario Ignacio, Jr., M.D., noted, "HA [headache]  
4 and possible migraine variant (to explain the vision issues) were discussed with  
5 appropriate drug therapy noted." Tr. 114. The ALJ gave partial weight to Dr.  
6 Ignacio's opinion and indicated that, "[t]o the extent that Dr. Schosheim's and Dr.  
7 Ignacio's opinions differ, I defer to Dr. Schosheim's assessment because he  
8 reviewed the entire record." Tr. 25. Despite the fact that Dr. Schosheim reviewed  
9 the entire record, he only testified regarding impairments related to his specialty.  
10 Thus, the ALJ essentially gave no weight to Dr. Ignacio's comment about Plaintiff's  
11 headaches, and neither Dr. Schosheim's nor Dr. Ignacio's opinion speaks to  
12 Plaintiff's neurocognitive disorder.

13 Dr. Ignacio cited Dr. Dougherty's February 2015 report which noted Plaintiff  
14 had "significant visual perceptual difficulties" and was not able to adequately  
15 distinguish the numbers and letters on the Trail Making test. Tr. 720. He noted,  
16 "[h]er responses to the mental status examination suggested some memory and  
17 concentration problems, probably due to the traumatic brain injury. . . . she is no  
18

---

19 <sup>5</sup> In fact, the ALJ did not allow Dr. Schosheim to be questioned about Plaintiff's  
20 traumatic brain injury or any other condition outside of Dr. Schosheim's expertise.  
21 Tr. 48.

1 longer able to read because of her visual problems.” Tr. 722. Dr. Dougherty found  
2 that Plaintiff has the ability to do at least some detailed and complex tasks, but  
3 “[c]ognitive difficulties as noted above may interfere with her ability to perform  
4 certain [tasks] and she has significant visual problems.” Tr. 722. The ALJ gave  
5 little weight to Dr. Dougherty’s findings and assessment of limitations in part  
6 because Dr. Dougherty is not a medical doctor and is not qualified to assess the  
7 medical aspects of Plaintiff’s condition. Tr. 26 (citing *Brosnahan v. Barnhart*, 336  
8 F.3d 671, 676 (8<sup>th</sup> Cir. 2003). Thus, Dr. Dougherty’s comments do not sufficiently  
9 address Plaintiff’s neurocognitive disorder and headaches.

10 Lastly, the ALJ gave slight weight to the opinions of Shannon Neer, PA-C,  
11 who treated Plaintiff regularly and gave several opinions that Plaintiff is unable to  
12 work due to her traumatic brain injury. Tr. 25-26, 729-31, 763-64, 817-19, 831-32,  
13 844-46. Once the ALJ rejected all of the findings and opinions related to Plaintiff’s  
14 neurocognitive disorder, there is no credited evidence constituting substantial  
15 evidence supporting any of the ALJ’s findings related to Plaintiff’s headaches,  
16 vision problems, and neurocognitive disorder. Thus, the matter must be remanded to  
17 obtain Dr. Gilmore’s records from the alleged onset date through the date of his  
18 opinion and, if necessary, further develop the medical record.

19 Additionally, Dr. Fligstein reviewed the record and completed a mental  
20 residual functional capacity assessment in February 2015. Tr. 115-16, 129-30. She  
21 assessed moderate limitations in the ability to maintain attention and concentration  
for extended periods, and in the ability to perform activities within a schedule,



1 maintain regular attendance, and be punctual within customary tolerances. Tr. 115.  
2 Dr. Fligstein opined Plaintiff is able to understand and remember simple and some  
3 detailed work tasks and is able to maintain concentration for the performance of full-  
4 time gainful employment, but “may encounter difficulty in maintaining her work  
5 schedule due to depressive symptoms.” Tr. 115-16.

6 The ALJ gave partial weight to Dr. Fligstein’s opinion. Tr. 26. The ALJ  
7 found Plaintiff’s residual functional capacity is more restrictive than Dr. Fligstein’s  
8 opinion and added limitations regarding interaction with the public due to Plaintiff’s  
9 PTSD. Tr. 26. However, the ALJ did not include a limitation regarding Plaintiff’s  
10 ability to maintain a work schedule and did not otherwise address Dr. Fligstein’s  
11 finding that Plaintiff may have difficulty maintaining a work schedule due to  
12 depressive symptoms. The ALJ need not discuss all evidence presented but must  
13 explain why significant probative evidence has been rejected. *Vincent v. Heckler*,  
14 739 F.2d 1393, 1394-95 (9th Cir. 1984). On remand, the ALJ should readdress Dr.  
15 Fligstein’s opinion and ensure all limitations supported by substantial evidence are  
16 included in the RFC finding.

## 17 **B. Symptom Claims**

18 Plaintiff contends the ALJ improperly rejected her symptom claims. ECF  
19 No. 11 at 14-17. An ALJ engages in a two-step analysis to determine whether a  
20 claimant’s testimony regarding subjective pain or symptoms is credible. “First, the  
21 ALJ must determine whether there is objective medical evidence of an underlying  
impairment which could reasonably be expected to produce the pain or other

1 symptoms alleged.” *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).  
2 “The claimant is not required to show that her impairment could reasonably be  
3 expected to cause the severity of the symptom she has alleged; she need only show  
4 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*  
5 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

6 Second, “[i]f the claimant meets the first test and there is no evidence of  
7 malinger, the ALJ can only reject the claimant’s testimony about the severity of  
8 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
9 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
10 citations and quotations omitted). “General findings are insufficient; rather, the  
11 ALJ must identify what testimony is not credible and what evidence undermines  
12 the claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834); *see also Thomas*,  
13 278 F.3d at 958 (“[T]he ALJ must make a credibility determination with findings  
14 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily  
15 discredit claimant’s testimony.”). “The clear and convincing [evidence] standard  
16 is the most demanding required in Social Security cases.” *Garrison v. Colvin*, 759  
17 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278  
18 F.3d 920, 924 (9th Cir. 2002)).

19 In assessing a claimant’s symptom complaints, the ALJ may consider, *inter*  
20 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the  
21 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s  
daily living activities; (4) the claimant’s work record; and (5) testimony from

1 physicians or third parties concerning the nature, severity, and effect of the  
2 claimant's condition. *Thomas*, 278 F.3d at 958-59.

3 With respect to Plaintiff's mental impairments, the ALJ first found  
4 Plaintiff's mental health symptoms are related to a specific event and lessened over  
5 time. Tr. 21. If a claimant suffers from limitations that result from situational  
6 stressors rather than a medical impairment, an ALJ may properly consider this fact  
7 in discounting Plaintiff's symptom claims. *See Tidwell v. Apfel*, 161 F.3d 599, 602  
8 (9th Cir. 1998) (finding ALJ properly rejected claimant's testimony in part based  
9 on claimant's motivation due to her stressful living situation); *Chesler v. Colvin*,  
10 649 F. App'x 631, 632 (9th Cir. 2016) (concluding symptom testimony was  
11 properly rejected in part because "the record support[ed] the ALJ's conclusion that  
12 [plaintiff's] mental health symptoms were situational").

13 The ALJ found Plaintiff's anxiety-related symptoms of fear, panic attacks,  
14 nightmares, and isolation were related to her history of physical and mental abuse  
15 and ongoing concerns related to her ex-husband.<sup>6</sup> Tr. 21. While Plaintiff has  
16 legitimate concerns about her ex-husband, the ALJ observed that she does not  
17 appear to view herself as someone who has problems interacting with others or  
18 with authority. Tr. 21, 303-04. The ALJ also noted that despite her anxiety, she

---

20 <sup>6</sup> Plaintiff's ex-husband was sentenced to 15 months in prison for threatening to kill  
21 Plaintiff and her children. Tr. 21, 354.

1 had a new boyfriend; she traveled to Oregon; she planned to attend nursing school;  
2 she goes to the gym several times per week; and she attends appointments on her  
3 own. Tr. 21-22, 54, 877, 991, 974, 1030, 1033. Accordingly, the ALJ found that  
4 she is able to engage with others, adapt to different environments, and venture out  
5 in public despite her anxiety related to her ex-husband. Tr. 22. This is a  
6 reasonable interpretation of the evidence and this is a clear and convincing reason  
7 for giving less weight to Plaintiff's mental health complaints.

8 Second, the ALJ found Plaintiff's mental health issues improved with  
9 medication. An impairment effectively controlled with medication is not  
10 disabling. *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.  
11 2006). The ALJ noted that in July and September 2016, Plaintiff reported her  
12 medication regimen had been "working really well." Tr. 22, 987, 996. In January  
13 2016 and May 2017, Plaintiff reported her mental health was stable and she had no  
14 concerns about depressive symptoms, PTSD, or medications. Tr. 22, 974, 1021.  
15 She stopped attending therapy and was discharged for lack of follow up. Tr. 22,  
16 976, 980. Her treating pharmacist indicated "her biggest issue is her uncontrolled  
17 pain" rather than any mental health symptoms. Tr. 22, 1021. This finding is  
18 supported by substantial evidence and constitutes a clear and convincing reason for  
19 giving less weight to Plaintiff's mental health claims.

20 With respect to Plaintiff's allegations of physical impairments, first the ALJ  
21 found the objective longitudinal record and the objective evidence does not support  
the level of limitations alleged. Tr. 22-23. While subjective pain testimony may

1 not be rejected solely because it is not corroborated by objective medical findings,  
2 the medical evidence is a relevant factor in determining the severity of a claimant's  
3 pain and its disabling effects. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.  
4 2001). The ALJ observed the imaging and exams do not support the existence of a  
5 right foot disorder or any problems with her hands. Tr 22-23, 905, 965. Imaging  
6 shows some arthritic changes in her lumbar spine facet joints and mild scoliosis,  
7 but in September 2016 there were no findings on exam, and the medical expert, Dr.  
8 Schosheim, found Plaintiff has limitations due to her back impairment which are  
9 included in the RFC. Tr. 23-25, 46, 907, 930. The ALJ noted that Plaintiff does  
10 not appear to allege any significant limitations due to her back impairment,  
11 obesity, rib fractures, past heart condition, and neuralgia since her testimony  
12 focused on her headaches and related concerns. Tr. 22. The ALJ's finding is  
13 supported by substantial evidence with regard to the specified impairments.

14 The ALJ also found the record lacks objective evidence regarding Plaintiff's  
15 allegations of severe headaches. Tr. 23. The ALJ observed the record contains no  
16 diagnostic tests or studies such as a brain MRI or a head CT, and that a vision  
17 exam resulted only in a prescription for corrective lenses. Tr. 23, 765-66.

18 However, the ALJ also found, "[s]he never saw a neurologist or other specialist for  
19 her severe headaches during the relevant period at issue in this case." Tr. 23. As  
20 discussed *supra*, this finding is based on error. Dr. Gilmore indicated that  
21 Plaintiff's poor cognition, difficulties with vision, and headaches cause an inability  
to concentrate. Tr. 642. Because the ALJ did not realize Dr. Gilmore saw Plaintiff

1 during the relevant period, this is not a legally sufficient reason for rejecting her  
2 symptoms claims regarding Plaintiff's headaches, vision issues, or neurocognitive  
3 disorder.

4 Second, the ALJ found Plaintiff's activities are inconsistent with the level of  
5 physical impairment alleged. Tr. 23. As noted *supra*, this can be a clear and  
6 convincing reason for giving less weight to a claimant's symptom allegations. *See*  
7 *Molina*, 674 F.3d at 1113. The ALJ noted that Plaintiff reported her pain  
8 medication worked well and allowed her to do activities like laundry. Tr. 23,  
9 1030. She was able to work out at the gym several times per week and ride an  
10 ATV. 792, 947. None of these activities necessarily conflicts with Plaintiff's  
11 allegations regarding her cognitive disorder, and to the extent they do, they do not  
12 by themselves constitute a clear and convincing reason supported by substantial  
13 evidence. One weak reason is insufficient to meet the "specific, clear and  
14 convincing" standard. *Burrell v. Colvin*, 775 F.3d 1133, 1139-40 (9th Cir. 2014)  
15 *Molina*, 674 F.3d at 1112; *see also Lingenfelter v. Astrue*, 504 F.3d 1028, 1035  
16 (9th Cir.2007). Thus, the ALJ's assessment of Plaintiff's symptom complaints  
17 regarding her cognitive disorder, headaches, and vision issues is flawed and must  
18 be reconsidered on remand.

### 19 **C. Duty to Develop the Record**

20 Plaintiff contends the ALJ erred by failing to develop the record regarding Dr.  
21 Gilmore's treatment record. ECF No. 12 at 4-6. In Social Security cases, the ALJ  
has a special duty to develop the record fully and fairly and to ensure that the

1 claimant's interests are considered, even when the claimant is represented by  
2 counsel. *Tonapetyan*, 242 F.3d at 1150; *Brown v. Heckler*, 713 F.2d 441, 443 (9th  
3 Cir.1983). The regulations provide that the ALJ may attempt to obtain additional  
4 evidence to resolve any inconsistency in the evidence, when the evidence is  
5 insufficient to make a disability determination, or if after weighing the evidence the  
6 ALJ cannot make a disability determination. 20 C.F.R. §§ 404.1517, 404.1519a,  
7 404.1520b(2), 416.917, 416.919a, 416.920b(2). Ambiguous evidence, or the ALJ's  
8 own finding that the record is inadequate to allow for proper evaluation of the  
9 evidence, triggers the ALJ's duty to "conduct an appropriate inquiry." *Smolen v.*  
10 *Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). For the reasons discussed *supra*, this  
11 matter is remanded so the ALJ can obtain and review Dr. Gilmore's treatment  
12 records.

#### 13 **D. Step Five**

14 Plaintiff contends the ALJ erred at step five by failing to include vision  
15 limitations in the hypothetical to the vocational expert. ECF No. 12 at 16-17. The  
16 ALJ's hypothetical must be based on medical assumptions supported by substantial  
17 evidence in the record which reflect all of a claimant's limitations. *Osenbrook v.*  
18 *Apfel*, 240 F.3D 1157, 1165 (9th Cir. 2001). The hypothetical should be "accurate,  
19 detailed, and supported by the medical record." *Tackett*, 180 F.3d at 1101. The  
20 ALJ is not bound to accept as true the restrictions presented in a hypothetical  
21 question propounded by a claimant's counsel. *Osenbrook*, 240 F.3d at 1164;  
*Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989); *Martinez v. Heckler*,

1 807 F.2d 771, 773 (9th Cir. 1986). The ALJ is free to accept or reject these  
2 restrictions as long as they are supported by substantial evidence, even when there  
3 is conflicting medical evidence. *Magallanes*, 881 F.2d at *id.*

4 Plaintiff's argument assumes the ALJ erred by finding no vision limitations.  
5 ECF No. 12 at 16-17. While the ALJ's findings regarding Plaintiff's neurocognitive  
6 disorder, headaches, and vision issues are not supported by substantial evidence, the  
7 Court does not conclude that any particular limitations regarding Plaintiff's vision,  
8 headaches, or cognitive disorder should have been included in the RFC. The ALJ  
9 erred in determining that Dr. Gilmore's opinion is not supported by treatment notes,  
10 which undermines all other relevant findings. Since the matter is remanded for  
11 development of the record and reconsideration of the opinion evidence, the ALJ  
12 must also revisit the sequential evaluation and ensure all limitations supported by  
13 substantial evidence are included in the RFC and hypothetical to the vocational  
14 expert.

## 15 **CONCLUSION**

16 Having reviewed the record and the ALJ's findings, this Court concludes the  
17 ALJ's decision is not supported by substantial evidence and free of harmful legal error.  
18 Accordingly, on remand, the ALJ shall obtain and review Dr. Gilmore's treatment  
19 record for the relevant period and reconsider his opinion. The ALJ shall ensure  
20 substantial evidence supports any findings regarding Plaintiff's cognitive disorder,  
21 headaches, and vision issues, which may involve further development of the record  
such as a consultative examination or testimony from a medical expert, as the ALJ



1 determines is appropriate. The ALJ also shall reconsider all other medical opinion  
2 evidence and Plaintiff's symptom complaints and conduct a new sequential evaluation  
3 in light of the findings contained in the newly developed record.

4 Accordingly,

5 1. Plaintiff's Motion for Summary Judgment, ECF No. 12, is **GRANTED**.

6 2. Defendant's Motion for Summary Judgment, ECF No. 13, is **DENIED**.

7 3. This case is **REVERSED** and **REMANDED** for further administrative  
8 proceedings consistent with this Order pursuant to sentence four of 42 U.S.C. §  
9 405(g).

10 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order  
11 and provide copies to counsel. Judgment shall be entered for Plaintiff and the file  
12 shall be **CLOSED**.

13 **DATED** September 26, 2019.

14  
15 *s/ Rosanna Malouf Peterson*  
16 ROSANNA MALOUF PETERSON  
17 United States District Judge  
18  
19  
20  
21